

No. 15,403

United States Court of Appeals
For the Ninth Circuit

IRA B. HOLMES,

Appellant,

VS.

HONORABLE A. S. HENDERSON, Presid-
ing Judge, Eighth Judicial District
Court of Nevada, Dept. II,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

Appellee submits that there is nothing in the record of the Transcript of Record from U. S. District Court for the District of Nevada, filed in the United States Court of Appeals for the Ninth Circuit, to support Appellant's Assignment of Errors.

Appellant's action, on which this Appeal is based, was brought in the United States District Court, for the State of Nevada, under Section 1983, Title 42, U.S.C.A.:

“Every person, who, under color of any statute, ordinance, regulation, custom or usage of any

state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Appellant's Complaint essentially alleged that Appellee, acting in his official capacity as District Judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, acted without jurisdiction in Case No. 54817 in the said District Court, in which case the Appellant herein was a party, and by reason of such action Appellant was damaged.

Appellant's Amended Complaint was dismissed with leave to amend and on the 22nd day of October, 1956, the Appellant's Second Amended Complaint was dismissed without leave to amend, for the reason the Complaint failed to state a cause of action upon which relief can be granted. (Transcript of Record from U. S. District Court for the District of Nevada, p. 92.) An appeal was taken from this order.

Appellant's Second Amended Complaint alleges “that at all times material hereto the Defendant was a duly elected, qualified, and acting Judge of the Eighth Judicial District of the State of Nevada in and for the County of Clark.” (Tr. p. 44.)

Appellant further alleges he commenced Case No. 54817 by filing “an action for divorce against one Irene S. Holmes”. (Tr. p. 45.)

He then alleges an Order of Dismissal was filed by the Court Clerk at his request (Tr. p. 46); that an order vacating the Order of Dismissal was made upon motion of his then wife, and party defendant of the said Case No. 54817 (Tr. p. 47), and that thereafter his then wife obtained a Decree of Divorce based on an Amended Answer and Cross-Complaint wherein his wife was awarded certain community property of the parties (Tr. p. 48).

Appellant's allegation of damage rests upon paragraph 19 of the Second Amended Complaint, "that the defendant herein was without jurisdiction in the said Case No. 54817 for the reason that no service of Summons was made upon the Plaintiff, and that said Judgment and Decree of Divorce is null and void." (Tr. p. 48.)

It is respectfully submitted that Appellant's Second Amended Complaint fails to state a claim upon which relief can be granted, and it was properly dismissed in the United States District Court for the State of Nevada.

Appellant alleges Appellee was at all times mentioned in his Complaint, the duly elected and qualified District Judge. (Tr. p. 44.)

There is no question of the State District Court having original jurisdiction in divorce matters. Article 6, Section 6, Nevada State Constitution. "The District Court in the several judicial districts of this state shall have original jurisdiction in all cases in equity . . ." *Thompson v. Thompson*, 247 P. 545, interprets this section.

Appellant's sole claim then rests on the contention that because he was allegedly not served with a copy of a Summons and Cross-Complaint, the District Court lost jurisdiction and any subsequent orders made by the Court were of no effect.

It is respectfully submitted the Appellee acted in his judicial capacity over a matter within his jurisdiction in Case No. 54817. So acting, he acted with immunity from any liability based on action purportedly in excess of jurisdiction. The record shows that the Judge of the Eighth Judicial District Court on the 5th day of November, 1952, entered an order vacating the Order of Dismissal theretofore entered by the Clerk of said Court on April 14, 1952 (Tr. pp. 55-57); that the attorney for the Plaintiff, being the Appellant herein, was present in Court representing said Plaintiff and that the said attorney did not withdraw as attorney of record for the Plaintiff and Appellant herein until the 8th day of December, 1952, (Tr. pp. 55-57). The Courts have consistently held that a Court has the authority to vacate, amend, modify or correct a judgment or order entered by that Court, providing the same is timely filed. An Order of Dismissal having been filed, the District Court retained jurisdiction to vacate the order. *Smith v. Smith*, 68 Nev. 10. In that case Esther Smith brought an action against William Smith and Isabella Smith to set aside an order which vacated a divorce decree between William and Isabella, while Esther and William were married. The original divorce decree was vacated on

the grounds the divorce was obtained by fraud on the part of William.

If it is conceded the Appellee committed error in the case so as to render the Decree of Divorce invalid, there was still jurisdiction over the subject matter and, therefore, any orders made by Appellee were made with immunity.

One of the most fundamental principles of law is that whenever a judicial officer acts in his judicial capacity, he acts with immunity. *Bradley v. Fisher*, 20 L.Ed. 646; *Yasell v. Goff*, 62 F. 2d 396; *Francis v. Crafts*, 203 F. 2d 809.

Appellant's recourse, if any, in Case No. 54817, would have been to appeal the case to the Nevada State Supreme Court. Appellant brought a Writ of Certiorari to the Nevada State Supreme Court and the Writ was denied. The Supreme Court held that petitioner had reaped the benefits of the Decree he claimed was void. *Holmes v. Eighth Judicial District Court, Honorable A. S. Henderson, District Judge, Presiding*, 71 Nev. 307, 289 Pac. 2d 414.

It is apparent that to permit Appellant to maintain a cause of action under Section 1983, Title 42 U.S.C.A. and hold a judicial officer liable for error committed within his judicial function, would expose judicial officers to the mischief of disgruntled litigants and by that mischief destroy our judicial system. The authorities are numerous in support of Appellee's contention herein and will not be restated as they appear in

Appellee's Motion to Dismiss and in the Court's decision thereon as a part of the record on Appeal. It is respectfully submitted that the Appeal be dismissed.

Dated, Las Vegas, Nevada,
February 21, 1957.

HAWKINS & CANNON,
HOWARD W. CANNON,
Attorneys for Appellee.